



DISPUTE RESOLUTION BOARD AUSTRALASIA INC

ABN: 14 196 085 859

5th AGM, 23 September 2008

PRESIDENTS REPORT

Five year Overview of DRBA Progress

The *Dispute Resolution Board Australasia Inc (DRBA)*, was officially incorporated as a chapter of the International *Dispute Resolution Board Foundation (DRBF)* on 19 June 2003 when a small group of believers in the concept managed to convince the Australian Constructors Association to provide financial support to bring a senior DRBF representative out from the USA and launch the concept at a series of seminars conducted in Sydney, Brisbane, Melbourne and Perth.

Since that time DRBA has been substantially self funded, reliant on member subscriptions (DRBA subs only) and time given freely by elected committee members and various co-opted sub-committee members.

From the outset, the DRBA business plan has been focussed on three main objectives:

- expanding the understanding of the DRB concepts as an extremely cost effective and efficient process for, in the first instance, **dispute avoidance** on construction projects, and where that outcome proves impractical, timely and economic dispute resolution;
- promoting the use of DRBs as the preferred dispute prevention and resolution model for major contracts;
- providing assistance to parties within the industry for the establishment and application of DRBs, including the provision of general advice and suggestions for tailoring to suit particular needs.

Progress was initially slow, but as we reach our 5 year anniversary, we now have a track record of achievements briefly summarised below:

1. *Built on the alliance with the Australian Constructors Association (ACA) and established an alliance with the Association for Consulting Engineers Australia (ACEA).*
2. *Through the local committees of champions, promoted the concept and use of DRBs with major procurers of projects.*
3. *Established a comprehensive website (www.drba.com.au) with member-only access to a wealth of material relating to DRBs.*
4. *Seen the establishment of DRBs in Australasia for the City West Cable Tunnel Project in Sydney, the Sydney Desalination Project, the Port Botany Expansion Project, the Ross River Dam in Townsville, the Brisbane Gateway Upgrade Project, the Ipswich/Logan Motor Interchange Project, the Christchurch City Council Outfall Pipeline Project and the Maari Offshore Field Development Project in Taranaki Basin, NZ. The collective value of these contracts exceeds \$A4Bn.*
5. *Made presentations to IAMA Conferences and ACEA seminars and industry generally. Conducted a Master Class Seminar entitled "Dispute Resolution Boards in Practice" on 1 March 2008.*
6. *Been represented at the DRBF International Conferences in Bucharest in 2007 (2 representatives) and Capetown in 2008 (4 representatives). [All DRBA attendees self funded].*

7. *Become an active participant in the new DRBF Region 2 established to cover countries outside North America.*
8. *At time of this report the DRBA Committee is aware of a further 6 to 8 major projects due out for tender within the next 12-18 months where the Owner's have either committed to or are very seriously considering a requirement for the establishment of DRBs for their contracts.*

The progress made to date has only been possible by the dedicated efforts of all those who have participated over the past 5 years. As we go forward, similar efforts will continue to be required.

COMMITTEE SINCE NOVEMBER 2007.

The Committee elected by a membership ballot at the Annual General Meeting held on 19 November 2007 was as follows:

(NSW representatives): Graeme Peck, Ron Finlay, Doug Jones;

(Vic representative): David Young;

(Qld representative): Alan McLennan;

(WA representative): Philip Loots;

(NZ representative): Michael Weatherley;

(ACA representative): Jim Barrett;

(Principal's representative): Max Tonkin;

(ACEA representative) Megan Motto

At the first committee meeting following the election, I was re-elected President, Alan McLennan was re-elected Vice President and Ron Finlay was re-elected Secretary-Treasurer.

During the course of the year, pressure of ACEA activities on Megan Motto led to appointment of Richard Kell as an alternate representative for ACEA. As most members will be aware, Dick is the immediate past International President of FIDIC, so his addition to the committee was very opportune.

Also, as the result of the new Region structure decided upon by DRBF in mid 2007, a new position of Country Representative Co-ordinator (CRC) came into being. [See further notes below covering Region 2 establishment]. Graham Easton attended the Bucharest International Conference in May 2007 and participated in the general discussions at that time regarding the proposed new Region structure. Graham was invited by the DRBA committee to take on the role of CRC (2 year appointment) and accepted that position.

A request for nominations for the new Committee is included with the notice of the next AGM to which this report is attached. The election will proceed in accordance with the rules at the AGM.

At time of this report, I understand all current Committee members have agreed to stand for re-election for the coming year.

In accordance with DRBA rules, the executive will be elected by the incoming elected committee shortly after the AGM.

DRBA MANAGEMENT PROCEDURES

During the course of the year, four committee meetings have been held at nominal 3 month intervals.

Regional subcommittees met on an ad hoc basis and continue to remain responsible for initiating and following up contacts within their geographical areas of responsibility.

Ron Finlay and his Personal Assistant Karen Harrison have continued to carry most of the administrative load. That load has been added to by the administration of the website. Their efforts are greatly appreciated.

I once again extend my thanks to all elected committee and co-opted sub-committee members for their support and assistance during the past year.

MEMBERSHIP

Membership of DRBA now stands at 58. This is only a small improvement on the numbers at the same time last year, which is something of a disappointment given the continued efforts of the committee and sub-committees and the market penetration we seem to be achieving.

The updated rules of DRBF, with which we are obliged to comply, include a provision that all local chapter members must be encouraged to become full members of DRBF. At the present time, approximately 35 of our members are also full members of DRBF.

DRBA WEBSITE

Ron Finlay and Max Tonkin are the website co-ordinators. Any member may submit articles deemed to be of interest to members, or of benefit to the DRB concepts. Articles submitted are subject to editorial review, but any editing will be cleared with contributors prior to the article being published on the website. Articles will be included on the website under appropriate category headings.

Members are encouraged to consider the website as the DRBA “newsletter” and to actively use it in this way.

A number of papers and technical articles presented at DRBF International conferences and Australia /NZ forums are included for member interest and information. These are regularly added to as we become aware of new information.

SEMINARS AND PUBLICATIONS DURING 2007/2008

DRB Master Class Seminar

The DRB workshop proceeded as planned on 1 March and proved very successful from both an educational point of view and financially for DRBA. The summary which follows below is an excerpt from a note provided to the DRBF *Forum* editor (Ann McGough) shortly after the workshop.

On Saturday 1 March 2008 twenty-two of Australia’s leading and aspiring DRB practitioners assembled for a Master Class Workshop conducted by the Dispute Resolution Board Australasia Inc (DRBA) at the seminar rooms of the Institute of Arbitrators and Mediators Australia in Sydney, NSW.

The workshop attendees included representatives of all current major Dispute Resolution Boards operating on projects in Australia as well as practitioners who had participated in total in over 20 DRBs.

There was extensive discussion and stimulating debate about the Workshop topics which included:

- (i) Role of the DRB within a project.*
- (ii) Types of DRB agreements and their terms.*
- (iii) Selection and appointment of DRB Members.*
- (iv) DRB Members’ fees and expenses.*
- (v) DRB Procedures, meetings etc.*
- (vi) DRB decision-making processes.*
- (vii) Specific issues and case studies.*

The workshop generated a number of ideas and recommendations that are to be considered by the DRBA Committee, including:

- whether or not the DRBA should establish a panel of potential DRB members or even a “President’s list” similar to that being established by the DRBF;*
- a consensus that the “interim binding” model for DRB determinations is the preferred Australian model; and*
- a need to update the DRBA precedents for DRB clause, Three party agreement and Operating protocols.*

Establishment of a Panel of Potential DRB members

Members are reminded that a decision was made several years ago that DRBA would not make recommendations on panel members should they be requested by contract parties to so do.

Subsequent to the Master Class workshop recommendation referred to above, the DRBA Committee has re-considered the question of the establishment of a panel of potential DRB members.

The view remains that DRBA is not yet in a position to make judgments or to grade members in the way that FIDIC has for several years, and that DRBF has recently commenced to do.

However, given the growth of the DRB concepts within our region over the past few years, it was decided that DRBA should establish a list of members who have expressed a willingness to serve on DRBs in the future. The list will include contact details together with professional qualifications, occupation or employment details.

Members wishing to be included should complete the form included with the notice of the AGM.

After establishment of the list, any organisations requesting information from DRBA as to potential DRB members will be referred to the DRBA Member List as a first step in their own enquiry process.

IAMA Conference

The IAMA National Conference was held in Perth on 10-12 April 2008 and there was a session devoted to DRBs with the participants being:

Melanie Meilhace of ICC. (Melanie is responsible for the ICC versions of the DRB concepts).

Graham Easton (chairing session).

Graham Easton reported that the session was well received.

Future Developments:

As noted in my last annual report, all Australian states are experiencing severe resource shortages, and the high demand for infrastructure and water projects particularly continue to generate alternative non-traditional models of delivery. Alliance type contracts have expanded dramatically at the large project end of the market.

DRBA has continued to explore how the DRB concepts may be beneficially incorporated into these delivery models.

Present client perceptions are that Alliance forms of contract delivery do not justify DRBs. However, DRBA is of the view that variants of Alliances which are coming into use warrant reconsideration of those perceptions.

The recently completed Ross River dam contract was a semi-Alliance (also described as a **hybrid alliance**) which incorporated a DRB. Both Owner and Contractor have expressed themselves as very satisfied with the DRB's role on that project.

Ron Finlay was a member of that DRB and a paper prepared by him on the benefits of DRBs in the various forms of Alliance contracts has been posted on our website [see *DRBs in Alliance Projects*].

DRB PROGRESS DURING 2007/2008

NSW:

There are now three major contracts underway in NSW utilising DRBs. There have been no new DRB contracts commenced since early 2008 but opportunities continue to be identified.

Rail infrastructure opportunities:

I indicated in my last annual report that TIDC had announced to the market that they intended to use DRBs on all contracts with value >\$50m. At the time of that announcement, two contracts had been prepared for issue for bids. For reasons explained below, the TIDC program priorities were substantially amended in first quarter 2008 and both contracts were deferred.

However, TIDC are about to finalise the procurement strategy for the 12km new South West rail link into Sydney. This new Project was one of the primary reasons for deferral of the two contracts referred to above. . TIDC held an industry briefing on 8 August 2008 to explain the project and to reiterate its previously stated intention to use DRBs. The South West rail link involves multiple contracts with a collective value in excess of \$1bn and probably of the order of 4 major contracts across a mixture of greenfield and brownfield sites, and a mixture of D & C (majority) and Alliance (minority) contracts.

DRBA was recently requested by TIDC to provide information covering international experience of the usage of a common DRB across a number of contracts on the same "Project", and also a DRB panel from which particular DRBs are selected according to the specific disciplines of the individual contracts for the same "Project".

With the assistance of various senior international DRBF members experienced in usage of both arrangements and with whom we established direct contact during the International Conference in Capetown, DRBA was able to provide considerable information at short notice. A very useful meeting between the NSW sub-committee and TIDC proceeded on 18 August which also covered the possibility of some form of DRB usage with Alliance contracts.

TIDC will of course make its own commercial decisions, but it appears likely that a significant number of substantial contracts with requirements for DRB members will be forthcoming within the next 12-18 months.

Opportunities in Resource Infrastructure:

We are exploring opportunities for expansion of the DRB concepts into public and private infrastructure contracts. We are developing a target contact list as an initial step.

QUEENSLAND

There are presently two major contracts underway in Queensland utilising DRBs.

During the course of the year, the Ross River Dam semi-Alliance contract was concluded, with all contract parties judging the DRB process to have been a very useful contributor to a dispute free contract.

Qld Main Roads have decided to proceed with another major road project utilising a DRB. The Pacific Motorway Transit project south of Brisbane is to proceed with an order of magnitude budget of \$350 M. This contract is to be an 'Early Contractor Involvement' (ECI) deal, which means the coverage of DRBs in our region over the past two years will then have encompassed 'Construct Only', 'Design and Construct', 'Design Build Operate Maintain', 'Alliance' [perhaps more correctly, semi Alliance], and 'Early Contractor Involvement' .

Across all formats, the process has so far proven very successful in **dispute avoidance**.

The Queensland sub-committee is also pursuing DRB opportunities in water infrastructure (Traveston and new Traveston dams) and a water treatment upgrade for Whitsunday Shire Council. There are also a number of opportunities that are being pursued in mining and major water infrastructure projects.

VICTORIA AND SOUTHERN AREAS

To date there have been no DRB projects established in Victoria.

The local sub-committee is endeavouring to raise the focus of DRBs across all the major government and semi-government procurement agencies in Victoria.

The group is in active discussion with senior government representatives with a view to having the DRB process incorporated into the construction contract for the new Royal Hobart Hospital project being planned by the Tasmanian Government. Projected total budget is of the order of \$1 Bn.

WEST AUSTRALIA:

For most of the year, representative Philip Loots was heavily involved in a major arbitration between his then employer and their client involving an offshore gas contract.

He has now resumed a more normal life and is focussing his efforts on convincing the major resource companies in WA that such a route is not in anyone's commercial interests.

His main areas of focus are the iron ore expansion projects (\$15bn) and the Chevron LNG/gas project (reported

value \$30-35 Bn, upwards of 1,000 individual contracts).

NEW ZEALAND:

The three person DRB established on the outfall pipeline project for Christchurch City Council has assisted resolving a number of issues and is working effectively.

The NZ representative is not currently aware of any other DRBs currently being established, but some are being considered under FIDIC contracts.

DRBA profile raising planned for 2008

A Conference/Seminar has been scheduled for 29 October 2008 in Auckland to profile the DRBA and DRB activities in New Zealand. Papers will include presentations from both Australia (G Peck) and New Zealand. At least one other Australian committee member is endeavouring to arrange a business visit to coincide with the seminar. The intention is also to cover other dispute resolution methods currently at the fore to emphasise the benefits of the proactive DRB process relative to more traditional reactive processes.

Industry publications "Contractor" and "Energy NZ" are interested in running articles on the DRB concepts and history and these will be used to promote the seminar in advance. An article has been drafted by the NZ group profiling DRB experience in NZ including explaining the workings of the DRB on the CCC Outfall project.

AusAID Activities

AusAID has made a policy decision that all significant construction projects outside Australia which are funded by Australian aid must proceed under the FIDIC harmonised contract. This policy is consistent with that adopted by all multilateral development banks. The FIDIC contract dispute provisions provide for establishment of a DRB (3 or 1 person, depending on contract value).

DRBA representatives Ron Finlay and Dick Kell met with AusAID senior officers in Canberra on 21 April 2008 to discuss how DRBA might assist AusAID in the use of DRBs.

AusAID identified that despite their adoption of FIDIC contracts for projects funded by them, they had no experience with the DRB concept and had a need for support and education of their staff.

Enquiries were subsequently received from AusAID regarding an Australian funded Indonesian road project. A note from Ron Finlay to all DRBA members on 28 May resulted in expressions of interest from six members. All responses were forwarded to AusAID Indonesia.

We finally established that:

- the Employer for the contracts would be the Indonesian Road Authority ;
- It was expected that about 60% of contracts would be in the range \$5-10M and the balance in the \$10-20M;
- the contracts would be distributed over the next 3 years.

The advice provided by the DRBA committee to AusAID can be summarised as follows:

- the size of projects would generally not sustain all DRB members being from Australia;
- there may be opportunities for DRB members from Australia to be chairman or to chair groups of project DRBs (especially in Indonesia projects).
- DRBA was not able to fund training activities. This would have to be done via either FIDIC, AusAID or the World Bank.

Any further contact with members who responded will be via AusAID directly.

FUTURE OPPORTUNITIES:

Your committee requires regular input from members as to future projects which are potentially suitable for incorporation of DRBs. Knowledge at an early concept stage is essential so that the regional committees of champions may have a realistic chance of:

- convincing Owners that the benefits of DRBs far outweigh the fixed cost factor associated with a Board,
- having the process included in the contract documents.

INTERNATIONAL DEVELOPMENTS- REGIONAL STRUCTURE

Region 2 confirmation

The adoption of the Region 2 plan was discussed at the Capetown conference and approved shortly thereafter. Graham Easton and I presented DRBA views to the committee dealing with the regional structure.

As from October 2008, management of the DRBF will fall under two regions- Region 1 (being N. America) and Region 2 (being 'Europe and the rest of the world'). DRBA will be part of Region 2. Future Regions will be split off from Region 2 as their growth reaches the stage where they can be financially self supporting across the full spectrum of services currently provided by DRBF Seattle. Initial budget projections by Region 2 suggested that around 130-140 full financial members is required to meet this requirement, but no numerical limit has been assigned – the test is financially self supporting.

Region 2 Management

Overall management of Region 2 is to be via a Board of 5 elected individuals:

President (term 1 year)

President elect (next years President)

3 Directors (2 year terms)

The immediate Past President will remain an ex officio Board member for the year following his/her 1 year term as President, so the President is effectively a 2 year term and the President elect a 3 year term.

Nominations were called in February for the Region 2 positions, closing date 15 May. The DRBA committee nominated Graham Easton for one of the Region 2 Director vacancies. Given the dominance of the European membership, we did not hold out any real hopes for success of our candidate, however we took this step to indicate our willingness to continue an active role in the regionalisation, particularly as DRBF envisage Australasia may become Region 3 within the next five or so years.

In the event, the ballot paper issued by DRBF on 19 and 20 June contained only one candidate for each of the vacancies. No other nominees (including ours) were named or listed, although it is apparent from the correspondence since the issue of the ballot paper that there were several other nominations including European candidates who were also omitted.

The process was queried by several members including ourselves. This led to advice from the DRBF President that the process followed a longstanding DRBF procedure ("Article IX, section 2") whereby "the President appoints a nominating committee who then recommend a slate of candidates."

In the present case, with only one nominee for each position on the ballot paper, we have expressed the view that the election is no more than a request for ratification of the candidates selected by the nominating committee.

It became evident that a process change was not practical prior to the election date, and the election proceeded on the historic basis. However, the election process for Region 2 at least is to be reviewed for future years.

I note that the Australian attendees at the Capetown conference met all of the persons who were included on the ballot paper. I have emphasised that our concern lies with the election process, not the "nominated" candidates.

A request for member comments on the election process is included in the August edition of *Forum* – see P.18.

All DRBA members who are also members of DRBF are requested to communicate their views to DRBF in accordance with the details to be included in *Forum*.

Changes in DRBA procedures

It is not expected that there will be any significant impact on the way DRBA is presently operating. There are some additional reporting requirements as between Chapters and Regions which we are required to forward on a quarterly basis. At the present time these are readily satisfied by our own established internal reporting produced for each committee meeting and our summary reports presented at the AGM.

There will be two Region 2 Board meetings per year which we understand we may be able to “attend” as observers via teleconference facilities.

THE WAY FORWARD

I consider DRBA’s primary role will continue to involve expansion of the present efforts to increase industry awareness and encourage usage by way of the example of the rapid international growth of the DRB concepts coupled with our own successes to date.

All the Boards presently operating or recently completed in our region appear to be achieving success in the primary objective of dispute avoidance. As we progressively achieve market penetration and the message spreads as to the benefits of the process, the ratio of market penetration to marketing effort should improve. However, we have a considerable way to go before the use of DRBs in our region will become self generating.

As always, any member thoughts or suggestions as to improved or alternative directions would be welcomed by the incoming committee.

Graeme Peck
President, DRBA

September 2008